

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Docket #20cv8924
IN RE NEW YORK CITY POLICING :
DURING SUMMER 2020 DEMONSTRATIONS : New York, New York
: February 13, 2023
-----: TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

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None

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THE CLERK: In the matter of In Re New York City Policing During Summer 2020 Demonstrations, case number 20cv8924. Starting with plaintiff's counsel, please state your appearances for the record.

6

MS. SWATI PRAKASH: Good morning, this is Swati Prakash from the New York State Office of the Attorney General for plaintiffs People of the State of New York.

9

MS. LILLIAN MARQUEZ: Good afternoon, Your Honor, this is Lillian Marquez of the Office of the New York State Attorney General on behalf of plaintiffs and the People.

13

MR. WYLIE STECKLOW: Good morning, this is Wylie Stecklow on behalf of the plaintiffs in the matter of Gray, et al. v. City of New York.

16

MR. DANIEL LAMBRIGHT: This is Daniel Lambright for the New York Civil Liberties Union on behalf of the Payne plaintiffs.

19

MS. COREY STOUGHTON: Good morning, Your Honor, this is Corey Stoughton on behalf - good morning, Your Honor, this is Corey Stoughton, also on behalf of the Payne plaintiffs, and I'm only one because I'm here if the Court does decide to address the Conforti motion.

24

MS. TAHANIE ABOUSHI: Good morning, Your Honor, Tahanie Aboushi of The Aboushi Law Firm appearing on

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2 behalf of the Roland plaintiffs.

3 MX. REMY GREEN: And good morning, this is Remy
4 Green of Cohen & Green on the Sow case, and if the Court
5 decides to roll in anything about the coordinated cases,
6 I'm here, I am on behalf of them too. For the
7 transcript, if we order it, I should appear in the
8 transcript as Mx. Green, spelled M-X period rather than
9 Mr. or Ms.

10 MS. GENEVIEVE NELSON: Good morning, Your
11 Honor, this is Genevieve Nelson for defendants.

12 MR. PETER SCUTERO: Good morning, Judge, this
13 is Peter Scutero for the defendants.

14 THE COURT: Okay, who is going to be speaking
15 for plaintiffs on number 774?

16 MR. LAMBRIGHT: I will, Your Honor, Daniel
17 Lambright.

18 THE COURT: Spell your last name please.

19 MR. LAMBRIGHT: L-A-M as in Mary-B-R-I-G-H-T

20 THE COURT: Okay. And Mr. - Mr. Scutero signed
21 the letter. You're speaking for defendants?

22 MR. SCUTERO: I will be speaking for the
23 defendants, Your Honor.

24 THE COURT: Okay. Okay, first, let me just say
25 we're recording this for purposes of anyone ordering a

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2 transcript, but any other dissemination or recording or
3 broadcast of this proceeding is contrary to law. I'm
4 going to start with 774, and my plan right now is to go
5 through the documents and try to give you rulings on
6 each. So it may be a little bit of a laborious process.
7 I will just note for the record that it was agreed that
8 I would decide this based on letters rather than based
9 on formal briefing.

10 So as I go through, I'm going to try to start
11 with the law enforcement privileged documents I think.
12 I'll make the ruling, as to the privilege, if it's
13 unclear or if I forget to address the issue of need or
14 substantial need or whatever the standard is for the
15 particular privilege, I'm counting on the plaintiffs to
16 remind me. Otherwise, if we just go on, I mean I
17 thought about need with respect to each of them, if I
18 haven't articulated it, and if it is something that I
19 find that there is privilege and you don't remind me and
20 I keep going, it means that I didn't find there was a
21 substantial need. So if you think you need to remind me
22 because I haven't said anything about it, I'm putting it
23 on the plaintiffs to do that. Mr. Lambright, do you
24 understand what I'm saying?

25 MR. LAMBRIGHT: Yes, Your Honor.

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2 THE COURT: Okay, good. The other thing
3 floating out there is attorney-client privilege. So,
4 Mr. Lambright, you need to remind me when we get to that
5 document in case I don't address attorney-client
6 privilege. Is it more than one or just one?

7 MR. LAMBRIGHT: I think there are a few
8 documents where there are attorney-client privilege
9 issues.

10 THE COURT: No, I mean in the sample. You
11 think there's a few?

12 MR. LAMBRIGHT: Yes, in the general but I can
13 check the sample again to see if --

14 THE COURT: All right, well, we're going to go
15 through it document by document. I actually have
16 noticed this too, just in case I miss it, you need to
17 remind me to address attorney-client privilege if I fail
18 to do that.

19 MR. LAMBRIGHT: Yes, Your Honor.

20 THE COURT: And then after we're done with all
21 this, as I said, we may or may not get to 680 which is
22 the after action review briefing. But in any case, to
23 the extent that I found that the privilege was not
24 properly asserted or that I found that the need was
25 there, we need to talk about what we're going to do

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2 about the documents that are not in the sample. You
3 know, one possible option - I mean my preferred option
4 is that I can somehow give direction that will cover
5 other documents. But if that doesn't seem to be what's
6 happening, you know, another option is to have a quick
7 process where the City sees that they're willing to, not
8 willing I guess is the right word, but whether they're
9 able to apply whatever principles I gave to other
10 documents, release those, and if there's any left, for
11 us to figure out what I'm going to do with those.

12 Okay, so having said all that, let me also say,
13 to the extent I'm going to be ruling, I should let the
14 record reflect what standards I'm using. For purposes
15 of law enforcement to me is completely laid out in the
16 Second Circuit case, (indiscernible) v. City New York.
17 It's a 7 F.3d 923. As to deliver the process standard,
18 I've written briefly on this in this case at 563 F.
19 Supp. 3d 84. And it's also expressed in Second Circuit
20 decisions such as ACLU v. National Security Agency, 925
21 F.3d 576. Those are the principles I'm using in making
22 whatever rulings I make during this phone call.

23 I'm not necessarily planning to do a separate
24 order after this phone call, so I hope you'll take good
25 notes as to what I rule as to each document.

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Okay. Looking now at all of the documents.

3

They were in two categories for me, NYPD documents and
4 OTM, which I guess is the Office of the Mayor documents.
5 Let's start with the NYPD documents. And let's talk
6 about the first one which is the Conforti log document
7 number 39. All right, now I know plaintiffs are
8 obviously at a disadvantage here. I still thought it
9 would be helpful for me to get some argument from the
10 City as to each of the documents, though if you can, Mr.
11 Scutero, just briefly explain the basis for the law
12 enforcement privilege on this one.

13

MR. SCUTERO: Good morning, Judge. I
14 apologize, I didn't realize we were going through the
15 sample. I thought we were going through all of the
16 documents that you requested on Friday. And so I do not
17 have that document in front of me. I can say too though
18 that --

19

THE COURT: How hard would it be for you to get
20 that document in front of you? I was planning to go
21 through the whole sample.

22

MR. SCUTERO: Yeah, I understand, Judge, I
23 didn't realize we were just, you were just doing the
24 sample because you requested all the documents on
25 Friday. I didn't realize we were just limiting

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2 ourselves to the sample. But it could take me a few
3 minutes, I could probably get it.

4 THE COURT: I think it's better. So we'll
5 wait, and whether you have the sample documents
6 available, let me know.

7 MR. SCUTERO: I appreciate it, thank you,
8 Judge. And I do apologize.

9 (pause in proceeding)

10 MR. SCUTERO: Sorry about that, Judge. I do
11 have the document in front of me. And basically this
12 document is a slideshow that was prepared with the, in
13 preparation for the Conforti report, the after-action
14 report. And it contains information regarding law
15 enforcement techniques as well as capabilities. It also
16 contains information relating to individuals who were
17 subject of investigations and information relating to
18 confidential sources. Because of those reasons this
19 document should be protected under the law enforcement
20 privilege. And plaintiffs have not provided a reason to
21 rebut that strong presumption that this document should
22 be protected, and even if they did, the fact that the
23 information contained in this slideshow contains such
24 sensitive information, it outweighs any significance or
25 need for the plaintiffs which they could obtain similar

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2 information through other sources.

3 (pause in proceeding)

4 MR. SCUTERO: Hello?

5 THE COURT: Sorry, sorry, I realized I was on
6 mute. I just spoke for about 20 seconds. So let me try
7 it again.

8 What I had said was I quibbled with the last
9 point that was made which is that the information could
10 be obtained from other sources. There's actually
11 information about specific individuals and criminal
12 activity of those individuals, and I question the model
13 charged and I questioned whether it could be obtained
14 from other sources.

15 So let me just turn to plaintiffs to see what
16 they would like to say on this document. Mr. Lambright.

17 MR. LAMBRIGHT: Yeah, I think, Your Honor, that
18 these documents go to the core of the claims at issue in
19 this case. You know, the NYPD and the City has made
20 assertion that their conduct was reasonable based upon
21 intelligence and threats, intelligence that they had
22 about threats of property damage or threats to officers'
23 safety specifically. But even if (indiscernible) the
24 privilege accurately applies to this document, it's
25 clearly overcome by the need for the case given that we

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2 have claims directly related to this. And the
3 defendants have asserted defenses that kind of rely at
4 least on the subject matter underlying this report.

5 THE COURT: Okay. So my ruling on this one is
6 that it clearly fits within the law enforcement
7 privilege in that it reflects information about specific
8 information and incidents and techniques. As to whether
9 it's been overcome, I'm just going to note that the need
10 to overcome, sorry, the level of showing needed to
11 overcome the law enforcement privilege is far greater
12 than what's needed to overcome the deliberative process
13 period. So my ruling with respect to this document is
14 not indicative one way or the other as to a ruling with
15 respect to a document protected solely by deliberative
16 process.

17 But given the specifics of the information
18 here, this is not a case that it's, the plaintiffs need
19 this in order to fairly litigate the case, and the mere
20 fact that in some generic sense the City might use the
21 existence of threats or things of that sort as an
22 explanation for their conduct is not enough to find a
23 waiver or a sufficient need. So I'm upholding as to
24 this document which is Conforti log document number 39.

25 Let's move to the next one. I assume the order

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2 in which these documents have been organized and the way
3 they were sent to me corresponds to something that you
4 two have. I assume it corresponds to the privilege log,
5 but my next one ends in 56452. Mr. Lambright, is that
6 sort of your next one?

7 MR. LAMBRIGHT: I'm trying to find it. Because
8 56412 --

9 THE COURT: 52, 56452 are the last digits.

10 MR. LAMBRIGHT: Give me one second, Your Honor.

11 THE COURT: Take your time. Mr. Scutero, this
12 is the order somehow they were, in what was sent to me.
13 Is this up on your screen?

14 MR. SCUTERO: I'm trying to pull it up now,
15 Judge.

16 THE COURT: Is there a better way for me to do
17 this? I mean I don't know how to identify it other than
18 by the last digits of the Bates number.

19 MR. SCUTERO: Yeah. No, I think that's the
20 best way to identify it, Judge. I just - you know, if
21 the Court would just be patient because it does take
22 some time on our end to pull up each document. Unless
23 the Court wants to adjourn for a short period, maybe 15,
24 20 minutes, so we can try and get everything organized
25 on both sides.

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2 THE COURT: Okay, I mean I don't think Mr.

3 Lambright has to find the document. He just has to find
4 this entry.

5 MR. LAMBRIGHT: Right, I found it. I found the
6 entry, Your Honor.

7 THE COURT: All right.

8 MR. LAMBRIGHT: It doesn't appear to be in a
9 particular order that sent it in or any kind of
10 particular order, but since I have the document, it's
11 pretty easy for me to pull up.

12 THE COURT: So, Mr. Scutero, I need your
13 judgment. My goal is to be as efficient as possible.
14 You know how many documents there are, 20 or so. What's
15 going to be faster, if I have you pull them up each
16 time? I think I could theoretically email the order - I
17 could email you something that has the order I'm about
18 to do this in. Would you have someone who could work on
19 it while we're doing this?

20 MR. SCUTERO: Yeah, I think that would be
21 helpful, Judge.

22 THE COURT: Let me see if it's actually
23 possible. Hold on a second. I'm cutting a column from
24 an Excel spreadsheet I've created.

25 MR. SCUTERO: Oh, and I do have that document

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2 in front of me. I think, Judge, what would be helpful,
3 because some of the documents have Bates stamps and some
4 have our control number, if you can reference to us
5 either whether it starts with DEF or DMN, then I can
6 navigate to the document a lot quicker.

7 THE COURT: Okay, hold on. I have a list of
8 the documents in the order. I'm going to try sending
9 it, hold on, one second.

10 (pause in proceeding)

11 THE COURT: Okay, I just sent it to Mr. Scutero
12 and Mr. Lambright. Okay, so you think possibly, Mr.
13 Scutero, someone can, while we're doing this, calling up
14 those documents for you?

15 MR. SCUTERO: Yes, I do, Judge, thank you.

16 THE COURT: Okay. All right, so let's go to
17 the next document which is daily intelligence briefing.
18 Happy to give the whole number, it's DEF PD0056452.

19 MR. SCUTERO: Yes, Judge, I have that document.

20 THE COURT: All right, just give me a moment to
21 look at my notes.

22 (pause in proceeding)

23 THE COURT: Do you want to talk about this
24 document?

25 MR. SCUTERO: Sure, Judge. This document

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2 consists of an intelligence briefing from the MTA, and
3 it includes analysis, news stories, as well as
4 assessments and definitions relating to terrorism.
5 Because these documents, because the information within
6 this document is a compilation of information relating
7 to terrorism and antiterrorism techniques and
8 guidelines, it should be protected under the law
9 enforcement privilege because releasing it would pose a
10 significant harm to the specific task force that this
11 briefing was released under.

12 It would show to potential bad actors what
13 information the MTA and the interagency counterterrorism
14 task force looks at when investigating terrorism and
15 when it is preparing and preparing to put into place
16 antiterrorism measures. This would provide significant
17 information to bad actors that can help them evade
18 antiterrorism, the antiterrorism task force in detecting
19 terrorists, potential terrorists, as well as thwarting
20 potential terrorist acts. Because of those reasons it
21 should be protected under the law enforcement privilege.

22 THE COURT: Mr. Lambright.

23 MR. LAMBRIGHT: Your Honor, our understanding
24 of this document is that it's essentially a roundup of
25 news sources and other primary open source intelligence.

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2 Defendants have never declared that these contain

3 identities of undercover sources or kind of any real

4 tactics that are used, or confidential tactics that are

5 used by officers in the field. It's hard to see how the

6 release of these documents would undermine the

7 confidentiality of sources or impair future

8 investigations.

9 Defendants have really, in their letter, only
10 claimed that these documents contain, quote/unquote,
11 "institutional thoughts" as to antiterrorism
12 investigations and NYPD thoughts and concerns about
13 potential terrorists threats. And these (indiscernible)
14 an amorphous description just simply do not meet the
15 standard.

16 And if we look to In Re City of New York, the
17 field reports that were at issue in those cases and
18 where the court found that the law enforcement privilege
19 properly applied involved undercover officers
20 infiltrating various organizations and the kind of
21 discussion about those concerns. And similarly in
22 McNamara, the documents at issue there were scenarios
23 about kind of hypothetical situation that, an actual
24 kind of discussions about the weaknesses of the NYPD and
25 kind of addressing various scenarios that might actually

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2 cause a rift of future harm. And here, or at least from
3 what we understand it from what the privilege log says,
4 here it does not appear to be the case.

5 Additionally, we would argue that it's over,
6 that because it's central to the case, it's overcome,
7 and additionally there are protective, there's a
8 protective order in place such that, you know, that
9 these documents would not be kind of widely distributed
10 to bad actors as the defense has suggested.

11 THE COURT: So let me ask Mr. Scutero, I feel
12 there's a difference between pages 1 through 4 of this
13 document and the remaining pages. Page 1 through 4 are
14 kind of an assessment of certain factual scenarios and
15 what they mean. I mean I didn't go through in detail
16 the remaining pages. It starts with news and then has a
17 description of a number of news articles, I mean all of
18 which is sort of completely irrelevant to this case and
19 maybe that's, that may be my answer. It has nothing to
20 do with protests in New York City, at least - yeah, I
21 mean it just has, it basically is just, you can't even
22 tell what the common theme is necessarily. Most of it's
23 terrorism. The first story seems to be something else.

24 Anything you want to say about those pages?

25 MR. SCUTERO: Well, Judge, the first four pages

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2 do relate to domestic terrorism, and as you mentioned,
3 it does make up an assessment by, or it consists of an
4 assessment by this interagency counterterrorism task
5 force. And distributing that information would impair
6 law enforcement's ability to conduct future
7 investigations because then terrorist actors, the
8 individuals who are, that this report details would have
9 this information and know who the task force would be
10 targeting and what they would be looking at. They would
11 look, they would have access to the definitions that are
12 also included in these first few pages that you've
13 mentioned.

14 With respect to the other pages, Judge, that
15 consist of news reports, although these news reports,
16 plaintiffs have access to because they're public source
17 documents, the fact that they're compiled together
18 within this report should also prevent this report from
19 being released. Because this shows what information law
20 enforcement is looking at, what information they're
21 relying on, what information they're assessing in order
22 to determine how to best counteract terrorist
23 activities.

24 And so because it's compiled into one document,
25 and this goes to the arguments we provided in our papers

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2 with regards to the Knight case, because these articles
3 are all contained in the same papers, in the same
4 report, it would provide information to bad actors and
5 would be a significant danger to not only New York City
6 but also would harm and impair law enforcement's ability
7 to conduct future investigations because terrorists
8 would have or potential terrorists and bad actors would
9 have this information, know how to get around it, know
10 how to, know what task force, antiterrorism task force
11 are looking at when they're investigating them.

12 So for those reasons, Judge, we think that this
13 should be protected under the law enforcement privilege
14 and should not be released.

15 MR. LAMBRIGHT: Your Honor, if I may. I'll
16 just note, again, defense counsel has not addressed the
17 protective order and the fact that I think at least, I
18 don't think any counsel is going to provide these
19 documents to any terrorists organizations.

20 Additionally, I'll just note that the Knight case that
21 was cited is a FOIA challenge and that distribution in
22 that case would have necessarily been public and not
23 subjected to the same type of protective element that we
24 have in this litigation.

25 THE COURT: All right. I've considered this

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2 document, and I believe that it would seriously impair
3 the ability of law enforcement agency to conduct future
4 investigations, to have, you know, its analysis of how
5 certain acts are to be considered and what kind of acts
6 are to be considered in assessing threats. Once again,
7 it's a very high bar for overcoming the law enforcement
8 privilege in terms of substantial need. I think
9 plaintiffs can easily litigate this case without this
10 specific information.

11 And as to the protective order, In re City of
12 New York was very skeptical about the ability of a
13 protective order to truly (indiscernible) the interests
14 of the law enforcement privilege, and given the relative
15 lack of relevance of a huge portion of this and even to
16 some degree the beginning portion, I don't think a
17 protective order is an effective mechanism here. So I'm
18 going to uphold it as to this document.

19 The next document is DEF EPD00120004. I think
20 it's - I'm not sure - I don't think we need to do
21 anything more on this. It's the same - it's the same
22 issue that was raised in the other one, unless, Mr.
23 Lambright, you think there's something different about
24 this.

25 MR. LAMBRIGHT: No, I think it is the same as

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2 the other document.

3 THE COURT: Okay, so it follows from my
4 previous ruling. So that's going to be upheld.

5 Okay, I think the next document is actually
6 deliberative process has been inserted in here. So
7 maybe I'd like to skip over the one ending
8 DNNL00251_000134920. So let's come back to this, don't
9 let me forget, but I think we have a few law enforcement
10 privilege ones after this. I'd rather do those.

11 Okay, the next one is DNNL00251_00160633. Mr.
12 Scutero, you have that one?

13 MR. SCUTERO: I'm pulling it up now, Judge.

14 THE COURT: You know, actually you can save
15 yourself some time. This one actually and the next one
16 which ends 68789 and 17856, they all involve a
17 confidential source. So, Mr. Lambright, having told you
18 that, tell me if you have anything else to say on this.

19 MR. LAMBRIGHT: Sure, I would say that even if
20 a confidential source is involved, you know, there are,
21 there's an ability to kind of redact the identifying
22 information of that confidential source. And, again,
23 given that issues of officer safety and intel are
24 particularly relevant to this case, and how the NYPD
25 reacted to the protests are issue, we would argue that

1 PROCEEDINGS 23
2 even if there's a confidential source, that the
3 privilege is overcome and that the defense can take
4 whatever means necessary to redact any confidential
5 information about that source.

6 THE COURT: Mr. Scutero.

7 MR. SCUTERO: Judge, we would say that we
8 argued that even redacting that would pose a danger to
9 the sources and methods by which the NYPD conducts its
10 investigations, and redaction does not necessarily
11 segregate all the information that would be harmful to
12 not only the source but also to the investigation that
13 these documents are related to.

14 THE COURT: I have to say, there's one of them,
15 the one ending 60633, Mr. Scutero.

16 MR. SCUTERO: Yes, Judge.

17 THE COURT: It's pretty truncated all this.
18 There's a source in there somewhere.

19 MR. SCUTERO: Yes, there is, without --

20 THE COURT: Can you tell me what line it is or
21 something?

22 MR. SCUTERO: I would have to go back to - hold
23 on one second.

24 (pause in proceeding)

25 THE COURT: Maybe it's in the attachment line.

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2 MR. SCUTERO: I believe it is in the
3 attachment.

4 THE COURT: Okay.

5 MR. SCUTERO: It is the attachment, Judge.
6 That is the source.

7 THE COURT: Got it. All right, so the problem
8 with redacting the name of the source is that the
9 information from the source can lead back to the source.
10 If it's any consolation to the plaintiffs, these are
11 extremely truncated brief emails, making references to
12 the source, that has very little utility in terms of the
13 plaintiffs' own case. So the privilege is there.
14 There's not going to be any great need, and, again,
15 relying on In re City of New York especially for
16 something like confidential sources, a protective order
17 is not sufficient protection. So I'm upholding it as to
18 those three documents.

19 Okay, I think we now have another deep
20 deliberative process in the middle of the law
21 enforcement privilege. It's the one ending 34771. I'm
22 going to skip over that and come back. And you know
23 what, the next documents ending, I remember these,
24 58479, 59557, those next two are the exact same,
25 undercover source problem. So I'm going to uphold it as

1 PROCEEDINGS 25
2 to those. I mean undercover or source, one or the
3 other, or confidential source.

4 Okay, the next law enforcement privilege one is
5 DNNL00251_00311632. So if you could call it up, Mr.
6 Scutero. I'm sorry, I think I jumped ahead. Did I?
7 So, no, I'm upholding as to, just to be clear, the one
8 ending 42609, 54769, and 58479, and also 59557. Yeah,
9 so I'm right. So the one we're up to now is
10 DNNL00251_000311632.

11 MR. LAMBRIGHT: And just to be clear, Your
12 Honor, those are all documents where there is a
13 confidential informant listed and there's basically not
14 much substance in the emails. Is that the
15 understanding?

16 THE COURT: Yeah, I mean if you want me to
17 verify there's not much content in the emails, I could,
18 but there was no question, I mean I just remember
19 looking - I'll look at them again if you want, hold on.

20 (pause in proceeding)

21 THE COURT: Yeah, same thing. Brief emails on
22 609. Brief email 4769. Same thing with 8479. And
23 we're skipping 555. Oh, no, 5557, yes, same thing.

24 MR. LAMBRIGHT: Thank you, Your Honor.

25 THE COURT: Okay, and now we're at 11632. Mr.

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2 Scutero, I mean this is a report about a particular
3 individual, a person of interest. I mean all kinds of
4 personal information about this person, and I mean it's
5 just quite obviously a matter that would undermine the
6 privacy of individuals involved in an investigation.

7 MR. SCUTERO: Yes, we agree --

8 THE COURT: Gang affiliation and all kinds of
9 stuff. So I'm holding this one too. There's certainly
10 no need by the plaintiffs, and a protective order is not
11 going to solve it.

12 Okay, I think there's only, in the next group,
13 which are the OTM documents, are any of those law
14 enforcement privilege? I'm trying to look at my listing
15 here. 6042258 or 323. Yes, 56, 51616, that's the only
16 one of that group. Do you see the one I'm talking
17 about? I'll give the full number. It's
18 DNNL00303_000151616.

19 MR. SCUTERO: Yes, Judge, I'm pulling it up
20 now. Judge, I think this falls under the same category
21 as the other briefing documents that you had already
22 ruled or upheld the privilege under.

23 THE COURT: Well, this seems like of a
24 different character because what it is is it seems to be
25 sort of a summary of how the intelligence bureau

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2 operates. I'm not saying it's not protected or is
3 protected. It's not like the daily terrorism briefing.
4 I'm not sure what you were likening this to.

5 MR. SCUTERO: Right, but at the - that is true,
6 Judge, that it does provide information as to how the
7 intelligence bureau operates and as such should be
8 protected. But if you scroll down to the end of the
9 document in the appendix, it also provides, you know,
10 information about terrorist plots that are targeting New
11 York City and emanating from New York City.

12 THE COURT: Yes, okay, and that is easily
13 protected, but I think you need to talk to me about
14 whether the first, I mean protected for the same reasons
15 I said earlier about the daily terrorism briefing of the
16 same character. But what about the first pages about
17 the structure and the different units that operate
18 within and how they operate, just address that please.

19 MR. SCUTERO: Sure, Judge, well, again, this is
20 information that pertains to techniques and procedures
21 that the NYPD uses to collect and assess intelligence
22 with respect to potential crimes. Because of that it
23 meets that first prong under the law enforcement
24 privilege and should be protected.

25 I don't - the plaintiffs haven't provided a

1 PROCEEDINGS

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2 compelling need for this information. They argue that
3 they should be entitled to intelligence relating to the
4 protests because their argument is that the defendants
5 have posited a defense that there was no intelligence
6 with regards to the protests and the NYPD relied upon.

7 But the information --

8 THE COURT: Wait, wait, wait. Say that again.
9 You said they posited a defense? I didn't follow that.
10 Try me again.

11 MR. SCUTERO: Yeah, so they, the plaintiffs in
12 their papers argue that the defendants have put forth a
13 defense that with respect to intelligence collection,
14 and if I can just - with respect to intelligence
15 collection that the defendants relied upon intelligence
16 in conducting their policing of the protests. The
17 document that we are currently looking at doesn't have
18 any information or at least doesn't appear to have
19 information with respect to - and I'm sorry, the
20 document, I just lost the document - doesn't appear to
21 have information relating to policing the protests at
22 issue here.

23 THE COURT: Well, I mean that's the substantial
24 need issue is what you're saying.

25 MR. SCUTERO: Yes, they --

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2 THE COURT: All right - go ahead.

3 MR. SCUTERO: No, I was just arguing that they
4 don't have a substantial need. We meet the first prong
5 under the law enforcement privilege because this
6 information pertains to techniques and procedures. They
7 now have to rebut that under the strong presumption that
8 privilege doesn't apply based on a compelling need. Our
9 argument is that they do not have a compelling need for
10 this information because it doesn't contain information
11 with respect to the protests.

12 THE COURT: Okay, Mr. Lambright.

13 MR. LAMBRIGHT: So, again, it's hard to
14 (indiscernible) not seeing what is actually there. But,
15 you know, I think maybe it's helpful to kind of just
16 talk about the importance of intelligence and the kind
17 of this litigation. You know, the defendants have
18 constantly asserted that they intelligence that there
19 are certain threats and that intelligence informed how
20 they responded to the protests. Obviously, we have
21 (indiscernible) challenging that the City's response to
22 the protests.

23 And additionally I'll note that in the DOI
24 report, one of the major concerns and kind of problems
25 that were pointed out about the NYPD's response to the

1 PROCEEDINGS 30
2 protest was faulty intelligence. And, you know, insofar
3 as, you know, insofar as the document can speak to how
4 the NYPD collected intelligence and how they collect
5 intelligence and how, you know, they got faulty
6 intelligence I think is particularly relevant, and even
7 if the law enforcement privilege does apply, it should
8 be overcome by the needs of this case.

9 And, yeah, that's, you know, and I'll just kind
10 of quote the decision by the, in Floyd where, you know,
11 the court said that an important factor is whether the
12 case is a civil rights case and it's certainly a matter
13 here that, it certainly matters here how the NYPD
14 conducted its intelligence gathering.

15 THE COURT: Mr. Scutero.

16 MR. SCUTERO: (no response)

17 THE COURT: Mr. Scutero, anything you want to
18 add to this?

19 MR. SCUTERO: No, Judge.

20 THE COURT: I mean what is the City's plan in
21 terms of testimony or defense it's going to offer saying
22 we did X because intelligence told us that, you know, Y
23 was going to happen?

24 MR. SCUTERO: Well, that is, Judge, that is,
25 you know, information that the City would rely upon.

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2 THE COURT: Well, I mean is it information in
3 any of the documents we're talking about?

4 MR. SCUTERO: Well, that's what I was - that's
5 what I was arguing before that there doesn't appear to
6 be information in this document that relates to the
7 protests. I'd have to --

8 THE COURT: Yeah, I agree as to this document,
9 but I guess maybe I'm reopening my thinking as to other
10 documents. I agree, this document - I'm not even sure
11 why it was considered relevant except that it summarizes
12 I guess how the intelligence bureau works, maybe that's
13 viewed as having some relevance. I don't think it's
14 really very, I don't think, you know, what units they
15 operate under and how those units operate are sufficient
16 relevance to overcome the privilege. But I'm just now
17 going back, you know, to some of the other documents
18 that had some specific intelligence. I mean obviously
19 the City is not going to be able to use those documents
20 in any way. I assume that's understood at a minimum.

21 MR. SCUTERO: Yeah, that's - yes. And the City
22 was not planning on using those documents, Judge, since
23 they don't --

24 THE COURT: So what are they going to use --

25 MR. SCUTERO: -- no relevance --

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2 THE COURT: What are they going to use to talk
3 about the threats? Are they just going to rely on
4 testimony and what is the testimony based on?

5 MR. SCUTERO: Well, Judge, I don't, I can't say
6 for sure offhand. The City will be relying on
7 testimony, and that will be subject of, you know,
8 depositions that plaintiffs are currently taking. But I
9 can't say for sure which documents the, that - without
10 seeing them in front of me, which documents the City
11 will be relying upon with respect to intelligence. I
12 can --

13 THE COURT: But it's not these documents
14 obviously.

15 MR. SCUTERO: Right, that's what I was going to
16 say, Judge, it's not these documents.

17 THE COURT: But what intelligence documents,
18 are there intelligence documents that don't reveal
19 techniques and (indiscernible)?

20 MR. SCUTERO: Well, I believe there would be.
21 I can't say for sure, Judge, but, generally speaking, I
22 would say that, yes, there are documents, there are
23 intelligence documents that could be produced or have
24 already been produced --

25 THE COURT: Well, I hope they have been

1 PROCEEDINGS

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2 produced --

3 (interposing)

4 MR. SCUTERO: Yes, sorry, Judge, I misspoke.

5 That have been produced that do not reveal techniques
6 and procedures. It's hard to say --

7 MR. LAMBRIGHT: Your Honor --

8 THE COURT: It's hard to say, you know, with
9 the documents in front of me, without knowing all the
10 documents in the universe of documents that have been
11 produced, whether or not, you know, there are documents
12 that the City will be relying upon with respect to
13 intelligence. I can't say that for sure because I don't
14 have, I don't know the whole universe of documents.
15 There's been so many that have been produced already.

16 THE COURT: Mr. Lambright, you were saying
17 something?

18 MR. LAMBRIGHT: Yes, Your Honor, you know, I
19 just want to flag that we do have a preclusion argument
20 and that, you know, even if the City's not going to rely
21 upon these specific documents to make its intelligence
22 argument, we need to be able to review, you know, it's
23 unfair for us not to have reviewed these documents and
24 to challenge, asserting that there were threats against
25 officer safety and other intelligence related matters

1 PROCEEDINGS 34
2 and not to be able to use these in our preparation for
3 depositions and those (indiscernible) challenge
4 assertions that are kind of made about threats to
5 officers' safety and terrorism threats. You know,
6 obviously there are going to be a lot of assertions
7 about whether there was actual threats or not, and to be
8 able to review these documents is kind of essential for
9 us to be able to say that, you know, one possible threat
10 was not really credible and to really kind of go and
11 say, and make our claim and case that the NYPD was
12 relying upon faulty intelligence to over-police these
13 protests and to escalate tension resulting in harms to
14 our clients.

15 MR. SCUTERO: Well, Judge, what I would say is
16 that, again, we would not be relying on the documents
17 that are subject to privilege in this case and that
18 plaintiffs' argument would essentially eviscerate the
19 privilege if they're saying that because they're making
20 an argument based on intelligence that then they can,
21 they should be permitted to view documents relating to
22 intelligence, that would just completely eviscerate the
23 privilege. We would not have the ability to assert
24 privilege at that point. And documents that ordinarily
25 would be protected would be subject to being disclosed.

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2 So I think it's a broad view of this sword and
3 shield argument that plaintiffs appear to be taking when
4 that sword and shield's argument is more narrowly
5 tailored than I think plaintiffs seem to be suggesting.

6 THE COURT: Well, In re City of New York is a
7 little equivocal on this. It seemed to be satisfied
8 with a notion that the (indiscernible) used as a sword,
9 though it did find in the alternative that even if it
10 was selectively disclosing reports that they found that
11 there was other information available through the other
12 reports, which they called the end user reports.

13 You know, looking at these documents, you know,
14 the undercover is much more specific than some of the
15 other ones. The other ones are really just not going to
16 be useful to the plaintiffs. So it's easy for me to
17 find that they certainly couldn't form the basis for
18 preclusion.

19 I think the way we're going to have to leave
20 this is if in questioning anyone about the basis for
21 their, you know, policing activities, if they're relying
22 on some intelligence reports and it's determined that,
23 in fact, the plaintiffs weren't provided with whatever
24 that information was, I think that would be the time to
25 come immediately back to me and see if at that point

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2 there's a basis for getting (indiscernible) preclusion
3 or something else. So it's not the most efficient way
4 to do it, but I don't really see any other way to do it.

5 So I'm going to adhere to my rulings on the law
6 enforcement privilege, and if something comes up in the
7 future depositions that suggests there's an unfairness,
8 I'm ready to hear it.

9 All right, let's move on to deliberative
10 process. And let me, I believe the first - let me just
11 clear out what I have. Okay, we're going to go back to
12 the NYPD documents, and I think the first one ends
13 34920. Mr. Scutero, do you see the document I'm talking
14 about?

15 MR. SCUTERO: Yes, Judge, I'm pulling it up
16 now.

17 THE COURT: Just give me a second to --

18 MR. SCUTERO: Yes, Judge, I have it.

19 THE COURT: Okay, so we're - so let me hear
20 what you have to say about this.

21 MR. SCUTERO: Sure, Judge. It's - as you know,
22 for a document to be privileged under the deliberative
23 process, it has to be pre-decisional and deliberative.
24 In this email exchange, you can clearly see that members
25 of the police department are suggesting and debating

1 PROCEEDINGS

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2 whether or not a certain tactic should be utilized in
3 terms of crowd control during the June 2020 protests.

4 THE COURT: Well, let me hear from Mr.

5 Lambright, and then I'll ask questions. Mr. Lambright.

6 MR. LAMBRIGHT: Yes. So, again, this document,
7 as we said in our letter, appears to be a document
8 relating to operational, to operations and not kind of
9 the formation of high level policy. And, therefore,
10 it's not deliberative in the meaning of the deliberative
11 process privilege. And, again, we would also make the
12 argument that it would be overcome by the needs of the
13 case.

14 THE COURT: So, Mr. Scutero, this is people
15 talking about practically in real time whether, as you
16 put it, to use a certain tactic or not. I'm trying to
17 understand why this is policymaking. Policy in my mind
18 involves, you know, a judgment about kind of an
19 overarching in some sense policy. I'm going to use the
20 Second Circuit term policy oriented judgment. And we
21 know it doesn't apply to routine operating decisions.
22 This was certainly a non-routine situation that happened
23 in 2020, but it's routine in the sense that the idea of
24 what tactics you're going to use in a given situation,
25 that's a judgment that is routinely made by the police

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2 department.

3 So tell me why this is policy and not, you
4 know, just trying to figure out how to police
5 demonstrations?

6 MR. SCUTERO: Well, Judge, we see the Court's
7 point that this appears to be relating to a operational
8 tactic for policing demonstrations, but it, you know, it
9 concerns using a certain technique that was not used
10 during the protests and was not used further in the
11 protests, so it essentially became a policy of the NYPD
12 to not use that certain tactic when policing the
13 protests in 2020.

14 THE COURT: Well, now you're saying whether
15 it's policy or not depends upon whether it's actually
16 employed. Well, that may be true in the sense that -
17 well, actually, no, I'm not sure why it matters whether
18 it's actually used or not used. I think whether
19 something is, quote, "policy," a "policy oriented
20 judgment," unquote, to quote the Second Circuit, doesn't
21 depend upon whether it's used or not.

22 All right, so on this one I don't believe the
23 deliberative process privilege has been met, and I think
24 this is operating decision, it's certainly being
25 discussed at the very highest levels, but just because

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2 something is brought to the highest level to my mind
3 does not make it a policy-oriented judgment. So I'm
4 going to order the production of this document which is
5 ending 34920.

6 Okay, let's go to our next one. The next one I
7 believe ended it's DMNL00251_000242609. And just give
8 me a moment to remind myself of what this is. Oh, wait,
9 no, no. I had the number wrong. It's not 42609. Is
10 that what I just said?

11 MR. SCUTERO: Yes, Judge.

12 THE COURT: I mean 37 - it's the same opening
13 DMN line but it's, the numbers end 00234771, that's what
14 I mean. Okay, let me call that up.

15 MR. SCUTERO: I'm pulling it up now, Judge.

16 (pause in proceeding)

17 MR. SCUTERO: Judge, this document, if I have
18 the right document, it's 234771. Is that correct?

19 THE COURT: Yes.

20 MR. SCUTERO: Okay. This document appears that
21 the law enforcement privilege would protect this
22 document.

23 THE COURT: That's not what you marked. Unless
24 I have it wrong, exhibit A at 2. Can someone check it?

25 MR. LAMBRIGHT: Yes, my, Your Honor, I only see

1	PROCEEDINGS	40
2	deliberative process privilege marked for this document.	
3	THE COURT: You're going to have to justify it	
4	or not on that basis.	
5	MR. SCUTERO: Yes, certainly, Judge. So this	
6	is a document that was submitted to a chief of the NYPD	
7	asking for approval of certain rules with regards to	
8	arrests and how they will be assigned and what type of	
9	approaches concerning violations the NYPD should take.	
10	And it's providing instructions for officers in the	
11	field, proposed instructions for officers in the field	
12	on how they should police certain areas during the	
13	protests and how they should treat the curfew during the	
14	protests.	
15	THE COURT: Okay, I mean I don't think I need	
16	to hear from the plaintiffs. This is just not a policy-	
17	oriented judgment going on here. This is decision about	
18	how to operate, what's going to be done very	
19	specifically with respect to the protests. It's a	
20	operating, what I view as a routine operating decision	
21	on that end of the spectrum, not a policy judgment. We	
22	don't know from this whether it's, you know, enacted or	
23	not, but that doesn't matter, it's just not	
24	deliberative. So I'm ordering production of that one.	
25	That's 34771.	

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2 Okay, let's go now to what I think - okay, I
3 think the next deliberative process is from the OTM
4 documents. And it's 16070. Let me just look at this
5 again to refresh my recollection.

6 (pause in proceeding)

7 THE COURT: Okay, so, Mr. Scutero, what do you
8 have to say about this one?

9 MR. SCUTERO: So, Judge, this document contains
10 discussion, questions and answers and discussion related
11 to a number of policies that were put in place with
12 respect to the protests, including how the City should
13 address certain issues like officer discipline and other
14 issues with respect to the protests.

15 THE COURT: All right, I mean, once again, I
16 don't see what the policy process is. I see this as
17 operating, how they're to operate during the course of
18 the protests. I see questions about things going on
19 with the officers at the protests. I just don't see a
20 policy-oriented judgment being made here. And just to
21 put it in context of the deliberative process privilege,
22 I can't see that in the future if this sort of
23 information were released, that this would inhibit
24 anyone from doing exactly what, asking the questions
25 that people are asking here about what's going on with

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2 the policing of the protests and the treatments of the
3 protests. So I'm not finding that there's deliberative
4 process privilege applicable here. So 16070 is ordered
5 released.

6 Next is 42258. Tell me what you want to say
7 about this, Mr. Scutero.

8 (pause in proceeding)

9 MR. SCUTERO: I'm just pulling it up now.

10 (pause in proceeding)

11 MR. SCUTERO: Oh, Judge, this is a document
12 that is pre-decisional in that you have members of the
13 Mayor's office discussing what should be, what
14 information should be disseminated to the public with
15 respect to certain policies that the City has employed
16 in policing the protests. It's deliberative because it
17 relates to these specific policies and, therefore,
18 should be withheld and protected by the deliberative
19 process privilege.

20 THE COURT: Okay, I don't need to hear from the
21 plaintiff again. This is geared towards, you know, what
22 public statement's going to be made about what is going
23 on sort of in real time with respect to actions of the
24 police during the protest. To me this is not a policy-
25 oriented judgment that people are deliberating about.

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2 It's, you know, a routine, it's a matter outside the
3 scope of policymaking. So I'm going to order 42258
4 produced.

5 Next is ends in, it's DMNL00303_000043232.
6 Anything you want to say about this?

7 MR. SCUTERO: I'm just pulling it up right now,
8 Judge. Again, considering the Court's rulings on the
9 last four documents, I would say that this probably
10 falls into the same category.

11 THE COURT: Okay, you saw the writing on the
12 wall.

13 MR. SCUTERO: Yes, Judge.

14 THE COURT: Okay, once again, not a policy-
15 oriented judgment. It's an operational decision about
16 what to do during the course of the protests. So that's
17 ordered produced. That's 43232.

18 Okay, next is the document ending 98522. Do
19 you know what I'm talking about?

20 MR. SCUTERO: I'm pulling it up now, Judge.
21 Yes, I see it, Judge. This appears to be meeting notes.

22 THE COURT: Okay, I don't even know whose
23 meeting it is, but go ahead.

24 MR. SCUTERO: No, Judge, I understand, you
25 know, the Court will likely rule has it has in the last

1 PROCEEDINGS 44
2 five documents. I will note though there are two points
3 in the notes that I think relating to discipline that
4 should be subject to redaction based on DPP because they
5 appear to propose certain guidelines for --

6 THE COURT: After the word discipline?

7 MR. SCUTERO: Yes, Judge.

8 THE COURT: And the second one with discipline?

9 MR. SCUTERO: Yes, Judge.

10 THE COURT: So you're saying even if the others
11 are deliberative process, you think those two are?

12 MR. SCUTERO: I think those two are, yes,
13 Judge.

14 THE COURT: Let me look at them again. Before
15 you start, let me just look at them more specifically.

16 (pause in proceeding)

17 THE COURT: All right, go ahead.

18 MR. SCUTERO: Judge, I would say with regards
19 to the first one, you have a suggestion on, an advice on
20 how discipline and misconduct should be treated by the
21 police department. The defendants would argue that
22 because of that this information is certainly pre-
23 decisional because a decision has not been since it's a
24 recommendation. And that is deliberative because it's
25 in the formulation of formulating policy with respect to

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2 disciplining of officers. And so for those reasons it
3 should be redacted under DPP.

4 With respect to the second one, Judge, I'm just
5 looking at that now and don't believe that one would be
6 subject to redaction.

7 THE COURT: Okay, so on the two that you just
8 said should be, why don't you address need.

9 MR. SCUTERO: Is that for defendants or
10 plaintiffs, Judge?

11 THE COURT: No, for you.

12 MR. SCUTERO: For me.

13 THE COURT: Tell me why there isn't a need. I
14 mean if you want to hear their need argument, I'm happy
15 to - it's just a little hard for them to do it given
16 they can't see what it is.

17 MR. SCUTERO: Right. Well, Judge --

18 THE COURT: You might as well go first.

19 MR. SCUTERO: Sure. Sure, Judge. I don't
20 believe that there's a need for this information because
21 certainly the plaintiffs can obtain this information
22 from other sources, either through --

23 THE COURT: Wait, wait, wait. They contain
24 information about what was being discussed in terms of a
25 proposal?

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MR. SCUTERO: Well, they could obtain not necessarily the proposal but what the actual policy with respect to discipline was at the time. That information that they could obtain and that's the information that's relevant to their case. Not information of what was being debated by the NYPD in terms of how they should discipline officers during the protests.

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THE COURT: All right, Mr. Lambright.

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MR. LAMBRIGHT: Yeah, so I have two points in response to that. First, again, it's hard to kind of know about seeing what we're discussing, but, first, I would just say that general kind of thoughts and ideas or concerns which defendants say about kind of generally how they discipline officers does not meet the kind of standards of the deliberative process privilege in that there has to be kind of a specific policy that (indiscernible) idea or discussion kind of aligned with. This kind of amorphous kind of generally talking about, you know, how to discipline officers doesn't just meet that standard.

And then my second point as to need is that, you know, obviously we have Monell theory against the City and one of the possible theories as to how one develops the Monell claim is failure to discipline. And

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2 if this goes to, you know, if this provides relevant
3 information about failure to discipline, excuse me, then
4 the need is overcome. Additionally, there are questions
5 about what decisionmaker, whether a higher level
6 decisionmaker is aware of and whether a higher level
7 decisionmaker ratifies, and all of those issues are kind
8 of relevant when kind of addressing whether the
9 privilege is overcome. It's not just narrowly an issue
10 of kind of looking at disciplinary policy as it's
11 written.

12 THE COURT: All right. I'm going to find this
13 is not protected by deliberative process privilege,
14 thinking specifically of the Grand Central Partnership
15 case, 166 F.3d at 682. Privilege does not protect a
16 document which is merely peripheral to actual policy
17 formation. And in order to apply the privilege, the
18 document has to form an essential link in a specified,
19 consultative process. And this is just too amorphous,
20 you know, it's completely unknown who did this as part
21 of what process. That specificity is just not gleanable
22 from the document and certainly hasn't been provided in
23 any other way. So I'm finding this document is not
24 protected by deliberative process privilege.

25

Mr. Scutero, I note this is one of the

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2 documents that said attorney-client. So are you giving
3 up on that or do you want to tell me what the issue is?

4 MR. SCUTERO: Judge, I don't see --

5 THE COURT: I suspect it's the second line
6 there.

7 MR. SCUTERO: Yes --

8 (interposing)

9 THE COURT: But that's not enough.

10 MR. SCUTERO: No, I agree, Judge. I don't see
11 how there would be, how this would be privilege under
12 attorney-client privilege.

13 THE COURT: All right, so 198522 is ordered
14 produced. I think we have two more in the sample.
15 13061, give me a second just to remind myself what this
16 is.

17 (pause in proceeding)

18 THE COURT: I remember, and I think you'll
19 probably guess, Mr. Scutero, that it's of the same ilk
20 as the other decisions. But if you think there's
21 something different about it, tell me.

22 MR. SCUTERO: Yeah, I think that's right,
23 Judge. I just want to look at the entire document if
24 you just give me a moment.

25 THE COURT: Take your time.

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MR. SCUTERO: Thank you.

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(pause in proceeding)

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MR. SCUTERO: Judge, my concern with this document, not necessarily the exchanges at the top of the document but further down, the email exchange that took place on June 1 at 5:38 p.m.

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THE COURT: Hold on. Let me look at that part.

9

(pause in proceeding)

10

THE COURT: Go ahead.

11

MR. SCUTERO: Judge, obviously, here you have members of the Mayor's office discussing the curfew, and you have advisors expressing, you know, their opinions about certain aspects of the curfew. And so those would certainly be pre-decisional and deliberative as the curfew was a, you know, a specific policy that was imposed by the City. With that in mind, that these, this conversation would fall under deliberative process privilege, and I don't see how plaintiffs have a need for this specific conversation. Again, the curfew is the policy that is put in place, and the deliberations that took place aren't relevant to the plaintiffs' Monell claims. It's actually the curfew in and of itself that is relevant to the plaintiffs' claims.

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And so how we get to the policy of the curfew

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2 doesn't provide much with respect to the plaintiffs
3 having to prove those claims. We know the curfew is in
4 place. Their claims relate to how that curfew was
5 imposed and whether or not officers enforced that curfew
6 properly. So the decision leading up to the curfew or
7 the deliberations I should say and the discussions
8 leading up to the curfew the plaintiffs do not have a
9 significant or compelling need for. So I would - the
10 defendants argue that this particular email conversation
11 starting at, on June 1 at 5:38 p.m. should be redacted
12 from this, from the document.

13 THE COURT: There's three people mentioned.

14 Who are they? Do you know?

15 MR. SCUTERO: Within the body or the people who
16 are conversing in the to and from lines?

17 THE COURT: No, no, in the body.

18 MR. SCUTERO: In the body. I do not know,
19 Judge.

20 THE COURT: Mr. Lambright.

21 MR. LAMBRIGHT: I would say that opinions about
22 - again, it's hard to comment on this without seeing
23 what's being referenced - but opinions about an ongoing
24 curfew would probably be too attenuated, the to/from
25 policy oriented judgment to constitute, to rightly

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2 invoke the deliberative process privilege.

3 Additionally, going to the needs of the case, it is not
4 merely - we're not seeking anything kind of generally
5 about the formulation of the curfew order. What we are
6 seeking is information about how the curfew was
7 interpreted and enforced after it was put in place, and
8 that directly goes to our claims. We have plenty of -
9 we know the policy on the books. However, we have
10 plenty of documentation showing that the policy was not,
11 that the policy was not being enforced against everyone,
12 and it was only being enforced against some people, and
13 we need to kind of understand why there were kind of
14 disparities in enforcement.

15 (pause in proceeding)

16 THE COURT: All right, look, my problem right
17 now is I don't know who these people are. I don't know
18 how it relates to a chain of, you know, decision-making.
19 I mean that piece of it is just missing here. Look, I'm
20 going to order this produced. I'll give you a chance to
21 redact this part, if you want to make a separate
22 application immediately to explain who these people are
23 and why it's part of some, you know, definable process
24 for formulating policy.

25 And let me give an alternative here. If you

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2 want to protect these people's names, you could redacted
3 them, and you have the names be for attorney's eyes only
4 so at least they know who they're dealing with. So
5 either produce the whole thing or produce it with an
6 attorney's eyes only redaction of the names, that's one
7 option. The other option is to produce everything but
8 the 5:38 email and make an immediate application to me
9 with an affidavit from someone who's explaining who
10 these people are and what the process was.

11 MR. SCUTERO: Understood, Judge, thank you.

12 THE COURT: Do you understand, Mr. Scutero?
13 Okay.

14 MR. SCUTERO: Yes, understood.

15 THE COURT: So that was 13061. And maybe I
16 should just make clear, in terms of need, I think, I
17 can't even think about that without knowing who these
18 people are. There could be zero need for this depending
19 upon who they are and what the process was. So I can't
20 think about that, you know, with the information I have
21 or rather I can't rule on it.

22 Okay, the last one in our sample ends 13266.
23 Is that enough for everyone or should I give the full
24 number?

25 MR. SCUTERO: No, I have it, Judge.

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THE COURT: Mr. Lambright, do you know what
we're talking about?

4

MR. LAMBRIGHT: Yes, Your Honor.

5

6

THE COURT: Okay, give me a second just to look
at it.

7

(pause in proceeding)

8

THE COURT: All right, this seems of a piece
with the ones earlier that I ordered to produce, people
talking on the spot about what to do and what's going
on. So is there anything else you want to add, Mr.
Scutero?

13

MR. SCUTERO: No, Judge.

14

15

THE COURT: Okay, so I'm going to make a ruling
that those are produced.

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Okay, so, you know, here's where we ended up.
We ended up with all the law enforcement privilege being
upheld and virtually none of the deliberative process
being upheld. So what that says to me is the City
should go back and presumably produce all their
deliberative process withheld material unless they think
they can make a case that there's something very
different about it and do that very quickly. Mr.
Lambright, do you have any ideas about how to do this?

MR. LAMBRIGHT: I mean I would just suggest

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2 that they produce the documents, you know, as quickly as
3 possible.

4 THE COURT: Yeah, I mean theoretically I
5 suppose I could just, you know, go over the remaining
6 hundred or two hundred or whatever it is documents. I
7 don't particularly relish doing that. So I'd like the
8 City to make some effort to spare me that and do it
9 quickly, and then if they say, no, we think these are
10 all different, you're going to have to go through them
11 all again, then that's what I'll do, I'll go through
12 them all.

13 MR. SCUTERO: Judge, I'd just ask if the City
14 could have some time to cull through the documents and
15 look to make sure that these documents fall underneath
16 the reasons and, the reasons why the Court produced or
17 ordered the production of the deliberative process
18 documents in the sample. So --

19 THE COURT: Okay, so, Mr. Scutero, you were
20 really quick I thought in looking at the ones we looked
21 at today. I know the conference took a long time, but
22 that was mostly me talking and thinking. You seemed to
23 go through them in a couple of minutes. So with that in
24 mind, how much time are you, thought you needed to do
25 it?

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2 MR. SCUTERO: Well, there are considerably many
3 more documents at issue, Judge, so I was hoping that we
4 could get two weeks.

5 THE COURT: I think I need you - the problem is
6 the depositions are now, you know, in full swing, I
7 hope, and I just don't, I think two weeks is too much.
8 I'll give you a week, Mr. Scutero.

9 MR. SCUTERO: Thank you, Judge.

10 THE COURT: So let's say a week from today,
11 that's the 20th. You know, it's a holiday, so you get a
12 break for a day, February 21.

13 MR. SCUTERO: Right, thank you, Judge.

14 THE COURT: So what I'm hoping to get from you,
15 well, my fantasy is you don't have to look at any
16 documents, Judge, we're just producing them all.
17 They're governed by your prior ruling. And then the
18 next possibility is here's the list of documents we've
19 produced, don't worry about those, and here's the ones
20 we're still asserting the privilege, and then I'll deal
21 with those.

22 MR. SCUTERO: Understood.

23 THE COURT: Okay. You know, for law
24 enforcement privilege, I feel like it's the, you know,
25 the most likely ones chosen by the plaintiffs didn't

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2 make it and some of them are of, you know, a category.
3 I think there's multiple. I'm not sure there's any
4 utility in my doing anything further, but I'm willing to
5 hear from you, Mr. Lambright.

6 MR. LAMBRIGHT: I mean if we could also review
7 and, you know, I think given your, the ruling on the law
8 enforcement privilege, also have a time and, you know,
9 just given how you ruled, if we can identify some
10 documents that we think should be turned over, if we
11 could provide that list to you maybe around the same
12 time as the defendants provide the DP list. I think
13 that - I would suggest that.

14 THE COURT: Okay, that's fine, in a week.
15 Hopefully, you'll be conservative in your request. But
16 I leave it to you to make that decision. You'll give me
17 a list of Bates numbers.

18 MR. LAMBRIGHT: Yes. Yes, Your Honor.

19 MR. SCUTERO: Judge, is there any way - Judge,
20 is there any way we could maybe limit that like you did
21 with the sample? I think you limited the sample to ten
22 to twenty documents. I think that would be a good way
23 going forward especially for Your Honor, given the
24 number of documents --

25 THE COURT: Well, I'm very appreciative of your

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2 valuing my time. I think it doesn't really affect you
3 all that much. Certainly, I'm hoping it's not more than
4 ten. I don't think I want to put a numerical limitation
5 on it. I mean I didn't limit you as to how many
6 deliberative process documents you could require to be
7 presented to me. So I think I just have to rely on
8 people's good faith at this point. If it's too much,
9 then I can always say, you know what, it's too much,
10 let's try another sample and see how that goes.

11 MR. SCUTERO: Understood, thank you, Judge.

12 MR. LAMBRIGHT: Thank you.

13 THE COURT: Okay. I think we're done on this,
14 and I'm ready to turn to the other one, but only just
15 check with Mr. Lambright, anything further on this one?

16 MR. LAMBRIGHT: No, Your Honor.

17 THE COURT: Mr. Scutero, anything further?

18 MR. SCUTERO: No, Judge.

19 THE COURT: Okay, I'm sorry, who's going to go
20 for the City on 680?

21 MR. SCUTERO: On the after-action review,
22 Judge, that would be me.

23 THE COURT: Okay, and for the plaintiffs?

24 MS. STOUGHTON: Your Honor, it's Corey
25 Stoughton.

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THE COURT: Okay. We're going to take a two-minute break, so just stay where you are, maybe on mute, and I'll be back with you in a minute. Okay?

5

(pause in proceeding)

6

THE COURT: Ms. Stoughton, is that you?

7

MS. STOUGHTON: I'm sorry, Your Honor, this is Ms. Stoughton.

9

THE COURT: Okay, no problem. Mr. Scutero, you're ready?

11

MR. SCUTERO: Yes, Judge.

12

THE COURT: Okay. Hopefully, this won't be as lengthy as the other, and I don't expect to be making oral ruling. This is really just have some questions.

15

Let me organize my notes. I guess one question I have for defendants to start with, which is I thought there was some implication that the plaintiffs have already given factual material underlying the draft after-action report and, you know, the (indiscernible) documents. I mean I'm trying to figure out if there's any way for me to determine that from anything, certainly nothing I have, and you know, I'm really jumping to segregability here.

24

But, you know, there's a couple charts here, page 10. There's a timeline that is, you know, I have

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2 to look a little more carefully. I think it's largely
3 factual. I don't think it shows a lot of deliberation.
4 I mean and there's page 15, 16, you know, those charts
5 scattered throughout here. Assuming deliberative
6 process were found to apply, why wouldn't at least those
7 charts and those numerical listings be segregable?

8 MR. SCUTERO: Well, Judge, purely --

9 THE COURT: And I know the legal argument, oh,
10 well, it shows you what they're thinking about, but some
11 of it is just so obvious, you know, I don't think I'm
12 giving anything away if I talk about number of arrests,
13 things like that. That, you know, you can't seriously
14 say that those charts show something about a policy
15 deliberation. Sorry if I cut you off if that was going
16 to be your answer and now you have to come up with
17 something else.

18 MR. SCUTERO: No, Judge, that was going to be
19 my answer that, you know, factual information isn't
20 always segregable because it does show the decision-
21 making process of the agency. But if the Court believes
22 that that information, that factual information in the
23 charts that you pointed out is segregable and does not
24 actually reveal the agency's process, then we would
25 defer to the Court's, obviously defer to the Court's

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2 decision on that.

3 THE COURT: All right, now here's a completely
4 different question, and this goes more to need again.5 I'm skipping over actual privilege for the moment. What
6 is it - in your briefing you say, oh, well, they're
7 going to get testimony; they don't need this. Why kind
8 of testimony do you think they're going to get that
9 replaces this? And if I've been accurately
10 characterizing what you said, tell me. I'll try to find
11 it.12 MR. SCUTERO: No, Judge, you did accurately
13 characterize it. Yes, we did mention that as an
14 alternative plaintiffs would be able to receive
15 testimony from individuals who were part of the after-
16 action review. Certainly, I believe Conforti is on the
17 deposition list. I'm not exactly certain --

18 THE COURT: But what are they --

19 (interposing)

20 MR. SCUTERO: -- plaintiff might be able to
21 correct me.22 THE COURT: But what are they going to get
23 testimony on? Are they going to get testimony on the
24 substance of the report or on the process of the report
25 of the review coming into existence and it not being an

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2 issue.

3 MR. SCUTERO: Well, that's a good question,
4 Judge. Obviously, those would be protected, those two
5 issues would be protected under deliberative process
6 privilege as well.

7 THE COURT: Well, hold on, hold on, hold on.

8 The first one much more obviously than the second one.
9 I'm not sure why the second one is. The process - the
10 process of creating the after-action review is not by
11 itself a policy.

12 MR. SCUTERO: But is --

13 THE COURT: That - go ahead.

14 MR. SCUTERO: Sorry, Judge. My understanding
15 of the case law on deliberative process is that the
16 actual process of making the decision is protected under
17 deliberative process and that's one of the reasons why
18 fact --

19 (interposing)

20 THE COURT: Hold on, hold on, hold on. I don't
21 know what you mean by the word process. And maybe we're
22 getting too meta here, if that's the right word. But
23 when five people in the policy department at the agency
24 get around and say, oh, what's going to be our policy
25 on, and let's pick something that's not in this report,

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2 you know, the number of officers to put in a police car
3 going out to a protest, should it be two or should it be
4 three? Their discussions about whether it should be two
5 or it should be three and what they said about it and
6 why one's better than the other, that's definitely part
7 of the policy process and policy-making process and
8 could easily be part of the deliberative process.

9 The fact that people met on something that's
10 now known, which was there's an actual after-action, the
11 fact that there was - I mean is it all completely out
12 anyway? It's in the affidavit. You gave an affidavit
13 on the topic which is, you know, that I was asked to
14 prepare a report, I did this, I did that, and then I
15 didn't do anything about it. The notion you could say
16 that I don't know what you meant by process, but that's
17 what I meant by process, and that's obviously something
18 you're going to have to give testimony on. Right?

19 MR. SCUTERO: I suppose that's correct, Judge.

20 THE COURT: Yeah. So, again, we need to
21 distinguish between the actual judgments that were being
22 bandied back and forth, the substance, whether it's two
23 or three police officers in the patrol car, and the, you
24 know, what I call a process of putting this report
25 together.

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2 So my question was really about the first thing
3 because I thought it was obvious that you were going to
4 give testimony about this structural process. Are you
5 going to give testimony about the recommendations and
6 what was considered and what was rejected and so forth?

7 MR. SCUTERO: The actual substance of what was
8 considered and what was recommended?

9 THE COURT: Yes.

10 MR. SCUTERO: No, that would be protected under
11 deliberative process, Judge.

12 THE COURT: Okay, so when you said in your
13 brief that they were going to get testimony, what is it
14 you were referring to?

15 MR. SCUTERO: Well, it certainly would not be
16 the actual substance of the report or those documents
17 and conversations and discussions that went into the
18 report. It would involve, as you say, the process of
19 how the report was done, how it came about, who actually
20 met about the report, things that have already been
21 provided on the declarations that we submitted to the
22 Court, that's all information that could possibly be
23 questioned during deposition.

24 THE COURT: Okay, so you can imagine it's cold
25 comfort to them for you to respond to their argument

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2 that they have a substantial need for this by saying,
3 oh, don't, you know, for the substance of this by
4 saying, oh, don't worry, you're going to get testimony,
5 because you're not talking about testimony about the
6 substance. Do you see the problem?

7 MR. SCUTERO: Yes, I do, Judge.

8 THE COURT: Okay. I want to clear that up.
9 And I think the rest of my questions are for the
10 plaintiffs. So I'm not sure, I'm happy to hear from you
11 about the substance of the deliberative process, but I
12 thought your stronger argument was about need. But if
13 there's something you want to say about substance since
14 we're all here, Ms. Stoughton, I'm happy to hear from
15 you.

16 MS. STOUGHTON: No --

17 THE COURT: But if you don't, if you don't, I
18 want to have some questions on need.

19 MS. STOUGHTON: I'm happy to focus on the need
20 issue.

21 THE COURT: Okay. So here's the problem.
22 You're going to get information from Conforti, you've
23 already gotten it, or from some other person about how
24 this after-action process was put into effect, they were
25 asked to do it, they went through all this effort, and

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2 then the whole thing fizzled out and they didn't do a
3 report. So you're going to have all the information you
4 need about what I call the process. Tell me why the
5 substance, why you need the substance of this for your
6 case.

7 MS. STOUGHTON: Your Honor, two things. First,
8 and I'm sure Your Honor would have seen this but just to
9 connect up the dots, in the letter regarding depositions
10 that the defendants just filed which is at ECF 841, the
11 defendants have moved to preclude the deposition of
12 Chief Conforti on the grounds that they assert, and I'm
13 quoting from the letter, "an end run around assertion,"
14 their assertion of the privilege. So I think that's
15 worth saying off the top.

16 THE COURT: Okay --

17 MS. STOUGHTON: Second --

18 THE COURT: -- but I think we now - hold on,
19 just to be, the record's clear. I think we've had a
20 concession, and if not we can come back to it, that the
21 process of doing this, whether it's Conforti or someone
22 else, is not going to be hidden. So keep going.

23 MS. STOUGHTON: Okay. The second thing to say
24 is just all of our experience, we've been litigating a
25 long time, that witnesses' memories fade over time. So

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2 it may be that Chief Conforti remembers every detail of
3 how the process unfolded and then fizzled out, but it's
4 very likely that he does not. And in those situations,
5 having documents to refresh the witness' recollection,
6 to focus the witness' memory, and to fill in the gaps
7 where that memory can't be refreshed is important. And
8 that is the primary concern in withholding all of these
9 documents without having any documentary record to give
10 a sense of shape to this critical process.

11 THE COURT: Okay, so I'm just trying to think
12 technically. I think - I don't know if it's Conforti,
13 but I mean I assume this is a 30(b)(6) topic. Maybe it
14 isn't. But it would be their responsibility to prepare
15 someone as to the process. So I'm not sure that the
16 answer is wholesale production of - and, by the way, the
17 report itself is not terribly indicative of the process.
18 The other, you know, perhaps - I didn't really focus as
19 much on the other documents. Maybe the other documents
20 give a little bit of indication of that - actually, I
21 remember them now. Some of them do.

22 But I mean is that - so you're - you're going
23 to be - it sounds like you're going to get what you need
24 if you find out that the, putting aside the substance of
25 the recommendations. You'll pretend, you know, one of

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2 the recommendations is three police officers versus two
3 police officers in a car. Your issue is not getting the
4 fact that that was a recommendation that was out there,
5 but the fact that they did not actually conduct, did not
6 actually kind of implement this after-action review and
7 have it distributed out to the NYPD.

8 MS. STOUGHTON: The only one of the issues.
9 Yeah, and that, of course, in and of itself is a final,
10 the decision not to circulate the report or adopt the
11 report is, of course, a final decision. So that
12 deliberative, deliberations about that fact shouldn't be
13 privileged. So to the extent that the documents, and
14 we'd have no way of knowing that from the privilege log,
15 but to the extent that the documents that we're debating
16 here reveal those discussions, those discussions
17 themselves are not privileged and they're very relevant
18 because, again, going back to the need argument, one of
19 the claims that plaintiffs have made drawing on
20 conclusions reached in the law department's, Corporation
21 Counsel's own review of the protests, is that the NYPD
22 systemically failed to follow through in these kinds of
23 reviews and learned lessons of past misconduct at
24 protests.

25 THE COURT: Okay, but you're going to get that.

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2 You're going to get that they conducted a review and
3 then failed to do anything with it or distribute it to
4 anyone. You're going to get all the information on
5 that. Why do you need the substance of three police
6 officers versus two police officers being one of the 25
7 recommendations?

8 MS. STOUGHTON: I think - I'm not sure that
9 we're as confident as you are that we are going to get
10 that information, just again because we can't really
11 know until the deposition happens, we don't know what
12 the witnesses know or don't know about that decision, or
13 what they remember and don't remember about those
14 decisions. So it's just always been our experience that
15 deposition testimony is never a full substitute for
16 getting a look into a documentary record of that
17 process.

18 The quality of this, of the decision-making
19 around the process, which is itself not deliberative
20 because it's not pre-decisional, is really relevant to
21 our claim. So getting a sense of the quality and nature
22 of that decision-making is important. And if we had all
23 the, complete confidence that deposition testimony would
24 completely duplicate what those documents reveal, that
25 would be one thing, but I just don't know, I don't see

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2 any basis, we don't see any basis for being sure about
3 that conclusion. And given how central this issue is to
4 our theory of the case and building plaintiffs' case for
5 liability, taking that chance, you know, is - that's why
6 the need exception exists to this qualified privilege.

7 THE COURT: Okay, but to the extent that I'm
8 accepting that you have that need, the report, again,
9 this is my question, the report - maybe some of these
10 later emails are what we're talking about. I was more
11 mentally focused on the report itself. The report
12 itself, which, again, has whatever recommendations it
13 has, again, one of the ones it doesn't have that I'm
14 giving as a hypothetical, three police officers versus
15 two police officers, that doesn't go to that. That
16 doesn't have anything to do with this. That doesn't
17 have anything to do with the process. Right?

18 MS. STOUGHTON: I mean I'd have to take your
19 word for it because we haven't seen the document, but I
20 can understand how that would be the case.

21 THE COURT: Okay. Let me just look at my other
22 notes here.

23 (pause in proceeding)

24 THE COURT: Let me just --

25 MS. STOUGHTON: Your Honor, I didn't want to

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2 interrupt your thought process, but before we move on --

3 THE COURT: Go ahead.

4 MS. STOUGHTON: -- to a different thing.

5 THE COURT: Yep.

6 MS. STOUGHTON: You know, again, just to play
7 this - I know you're not going to rule today, but if you
8 are considering not ordering the production of the
9 documents, you know, one question that I would have is
10 whether the documents - again, I'm very concerned about,
11 and this is based both on experience in other cases but
12 also on our one experience with a 30(b)(6) witness so
13 far. And I'll just point out that Conforti I think is
14 not a 30(b)(6) witness, a fact witness, but serving the
15 same sort of function here, testifying as to this
16 process. And based on that experience we are
17 anticipating that the witness will have various times
18 when the witness' recollection needs to be refreshed.
19 And I think the challenge arises in not having these
20 documents available to use for that purpose. And if
21 there's an alternative way to ensure that the witnesses
22 were ordered to be prepared on this topic with
23 documents, that would I think perhaps not fully solve
24 the problem but go some way toward ensuring that the
25 depositions did serve as an adequate substitute.

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2 THE COURT: I'm sorry, what was the proposal at
3 the end, that what happened?

4 MS. STOUGHTON: Well, if the documents, if the,
5 well, look, here's the problem. I'm not sure what I'm
6 proposing here but I'm trying to brainstorm a solution.
7 Our concern is that we have had the experience already
8 with a 30(b)(6) witness in this case where the witness
9 was, in fact, not prepared to testify to certain topics.
10 And so we are concerned that Chief Conforti, you know,
11 he's not even a 30(b)(6) witness, he's a fact witness,
12 and if his memory is not refreshed in some way as to
13 this process, it will not come into a deposition which
14 is really refreshed. And if there were a way to ensure
15 that he was fully prepared with the documents that we
16 might not have access to at least to be prepared to
17 testify as to the details of the process of creating the
18 report and the decision not to proceed with it, you
19 know, that could help. I mean, again, I don't know what
20 that would look like because I never, I've never been in
21 a case where the defendants (indiscernible) to prepare
22 their witness in a particular way.

23 I say this more to highlight the issue, a
24 particular concern that we have about not having those
25 documents available to refresh his recollection.

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2 THE COURT: Okay, well, I think the City should
3 understand, and I'm sure Mr. Scutero will agree with me,
4 that whoever is prepared to testify about the after-
5 action review process has to be fully prepared and may
6 need to use deliberative process documents, protected
7 documents in order to refresh their recollection or even
8 to educate themselves perhaps to some degree. So there
9 has to be full preparation. If it didn't happen, then
10 it would have to happen all over again if it was
11 understood that there were documents that they hadn't
12 bothered to look at.

13 So perhaps that takes us a little bit of the
14 way you were looking for us to go, Ms. Stoughton, is
15 that fair?

16 MS. STOUGHTON: I think it would if it all
17 plays out as you just anticipated. I'd say the concern
18 would be if it doesn't, then especially given all the
19 time pressure we're all under, that feels like, you
20 know, not the most efficient way to approach this, and
21 having the documents would be much more efficient.

22 THE COURT: Right. Yeah, the other documents
23 that have been withheld, not many of them actually go to
24 process, I'm now looking at them. They're more like
25 little subsections of the report or a new draft of the

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2 report. You know, none of it really is I would call,
3 almost none of it, I'm just going through them one by
4 one now. They're all like draft sections of the report
5 or is like a PowerPoint version or a mini version of the
6 report, edits another report. Yeah, there's really
7 almost nothing, except for the very last document. Let
8 me see what you have on that --

9 MS. STOUGHTON: Is that document 32?

10 THE COURT: No, it's - yes, document 32 from
11 Andrews to Conforti. That's the only one that fits into
12 that process, I'm sorry, into that category. So let me
13 now, having heard from you, let me think about that and
14 see if there's any piece of this.

15 (pause in proceeding)

16 THE COURT: Yeah, some of it - there's a tiny
17 bit of substance in this. Yeah --

18 (interposing)

19 MS. STOUGHTON: Your Honor --

20 THE COURT: -- it has some substance.

21 MS. STOUGHTON: -- can I just make a point
22 linking up the draft report and the process which is
23 this, that, you know, it's - as Your Honor knows because
24 you've been discussing it today, the case law suggesting
25 that there's a link between the facts an agency or

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2 government official review and the process kind of is,
3 the flip side of that coin is that that information can
4 be relevant when there's a need argument, when the
5 process is at issue. I think one of the things that we
6 think is critical about getting some window into the
7 draft report is that we don't have, again, putting the
8 deposition question aside, any other way to understand
9 what it is that the NYPD thought it was important to
10 look at after the 2020 protests. What did they chose
11 and not chose to focus on and examine? And I don't
12 think we have any real way of getting a full and robust
13 answer to that without knowing what kinds of, you know,
14 what are the subject, what are the headers of the draft
15 report, what are the subject matter areas that they were
16 looking into and not looking into and what's missing
17 from that.

18 And so I'd say that to say that in addition to
19 whatever portion of documents you're looking at, I do
20 think that bigger picture - and that doesn't mean every
21 document. I mean I recognize what you're saying about
22 some of these are just fragments, and just being
23 perfectly frank, I think the list of documents that we
24 moved on were move of a group. I'm sure it's probably
25 true that we could get the picture without every single

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2 one of those fragments. It's just drawing a distinction
3 between us moving on one of them and not the other is
4 like we couldn't draw a sensible line there.

5 But that's the point I wanted to make is that
6 that - just to take one step backwards, it is based on
7 the documents we reviewed and what Chief Conforti has
8 said in his affirmations in support of this, it seems
9 that there is no standard process for these after-action
10 reviews. So the only way to understand what kind of
11 process is used is to look at this process, and, again,
12 that's not an interest in looking at what were the draft
13 recommendations, was it two officers in a car, three
14 officers in a car, but more the shape of it. And we
15 don't really have a window into that unless we get some
16 window into these drafts.

17 THE COURT: Okay, so now we've expanded from
18 where we were before, and that's fine, but I now need to
19 think about this new argument. I mean new in a sense of
20 new just now, not that it wasn't observed in your
21 papers. So the thought is that you need to see whether
22 they were making recommendations about the number of
23 people in police cars in order to judge whether this
24 was, making some judgment about the sort of efficacy,
25 potential efficacy of the after-action report. Try

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2 connecting it up with me again.

3 MS. STOUGHTON: I think that was well said.

4 THE COURT: I'm just making that up. Okay, go
5 ahead.

6 MS. STOUGHTON: I thought you put it very well.
7 The question of what issues, challenges they looked at
8 and didn't look at speaks to the efficacy of their
9 after-action review process. And, again, as many
10 reviewers, including Corporation Counsel, the Department
11 of Investigation, have noted, and as, you know, as our
12 experts will note, that kind of reflection of a review
13 process is, should be part of any competent police
14 department's approach to these issues. And so getting a
15 sense of what that process is and how good or bad the
16 NYPD is at it is central to our Monell claim because of
17 the claim that this is a repeated pattern of failing to
18 draw those lessons and learn those lessons.

19 THE COURT: Mr. Scutero.

20 MR. SCUTERO: Well, Judge, it's defendants'
21 position that, you know, again, going back to what the
22 Court had already set out was that the after-action
23 review process is something that they can look into, but
24 the actual substance of that information does not
25 actually go to their Monell claims because, again, there

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2 is already decisions made and policies put in place that
3 is relevant to their Monell claims, not actual policies
4 that were not put in place. And some of these
5 recommendations that Conforti has in his report were
6 adopted by the NYPD.

7 They're able to, they should be able to get the
8 information that they're seeking about the after-action
9 review process through deposition and not through the
10 actual substance of this report. This report, it's
11 about discrete issues --

12 THE COURT: They're saying, I mean just to
13 focus you. Forget the first half of our conversation
14 about this because it turns out they want more than just
15 the process. Let me put it this way, they want more
16 than just the, you know, technical, you know, who
17 proposed to whom and what date and who killed it and so
18 forth. They want to have the actual information in the
19 report or the minimum the topics that were looked at I
20 guess so that they can get up and say, you know what,
21 this after-action report that, I guess, maybe, Ms.
22 Stoughton, maybe I need you to correct me. You can get
23 up and say, oh, I mean it seems to me like it's enough
24 to know that they did not disseminate this in this form
25 to the police department. I assume that you'll find out

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2 about changes in policy if there were any and they're
3 certainly not reflected in this report, that doesn't
4 give any information about what ultimately happened
5 later, assuming it's even relevant.

6 But I guess, Ms. Stoughton, let me just turn
7 back to you, I'm trying to see why it adds anything for
8 you to say, you know, they - I mean I'm just trying to
9 imagine what this looks like. You have an expert get up
10 and testify they looked at putting in three police
11 officers but not two police officers, and that's not
12 part of a good after-action review. And then I say to
13 myself, well, who the hell cares. They didn't issue
14 this report anyway. I mean that seems to get you all
15 the way to home base. They didn't issue this out to the
16 police commanders. Who cares whether they looked at one
17 thing or fifty things?

18 MS. STOUGHTON: Well, except that I think the
19 reason that Chief Conforti and others and counsel's
20 represented that the reason that they didn't adopt it is
21 because they sought, that the recommendations in other
22 reports like Corporation Counsel's or the DOI's report
23 were better or sufficed or something of that nature.
24 And so we do know I think through that and through other
25 discovery what changes they did and didn't adopt. But

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2 that still leaves open the question of what was the
3 NYPD's own process for learning those mistakes because
4 that is relevant. I mean it just so happens that in
5 this particular instance a lot of outside agencies,
6 independent agencies or quasi-independent agencies also
7 reviewed things. But what is really relevant is what is
8 the NYPD's own internal mechanisms for learning those
9 lessons, and, you know, frankly, plaintiffs' theory is
10 that they don't have any. But we have to, we need to
11 know what they did, what process they went through to
12 try to learn those lessons even if at the end of the day
13 they --

14 THE COURT: Well, again, process --

15 MS. STOUGHTON: -- thought, well --

16 THE COURT: Process yes as I use that term, but
17 why do you need to know - let's pretend there's 50
18 things in here and one of which is the three versus two
19 police officers. Why do you need to know that part of
20 it? Why do you need to know the substance of it?

21 MS. STOUGHTON: Well, I don't know we need the
22 three versus two, but we need to know what things they
23 looked at, what topics they looked at. For example --

24 THE COURT: Okay --

25 MS. STOUGHTON: Give me a second to give you an

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2 example.

3 THE COURT: -- number of police officers in
4 cars. Okay.

5 MS. STOUGHTON: So I don't know if this is
6 true, but if our expert told us that any responsible
7 police agency would have looked at the numbers of police
8 officers in cars during the 2020 protests and tried to
9 figure out what about those numbers was good or bad, and
10 then it turns out they didn't look at that at all during
11 the Conforti review, then that seems highly relevant to
12 establishing that the NYPD continues to have a poor
13 process by which they will never learn lessons because
14 they don't look at the right things or ask the right
15 self-reflective questions.

16 THE COURT: But is there any evidence this, I
17 mean this process, again, this process was terminated
18 and did not play out and didn't happen the way it was
19 supposed to. So I mean we're going in circles here. I
20 guess I --

21 (interposing)

22 MS. STOUGHTON: I do understand - if I could,
23 Your Honor. I do understand what you're saying, but I
24 think the reason - if it were terminated and they said
25 we're not doing anything, I think you'd have a point.

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2 But they didn't say that. They said we're terminating
3 it because somebody else did the same thing and we're
4 going to go with their conclusions because --

5 THE COURT: Right, which you have.

6 MS. STOUGHTON: -- maybe because it's
7 duplication --

8 THE COURT: You did have that. If you didn't
9 have that, then I would understand it, but you have the
10 other thing, whatever this other thing is.

11 MS. STOUGHTON: Yes, but that other thing
12 doesn't speak to the NYPD's own internal processes. And
13 let me just bring another point, it's important to
14 remember that there's an injunctive relief claim and
15 that the defendants have claimed mootness. So to that
16 point I think the next time there's a protest, we can't
17 rely on the fact that Corporation Counsel and the
18 Department of Investigation might undertake their own
19 review. Once again, our clients would be relying on the
20 NYPD's own internal ability to learn lessons. And so,
21 again, what it does as an agency to look back at its own
22 actions and learn lessons is critically important to
23 establishing, you know, the risk of ongoing harm to our
24 clients and backward looking the decisions made by NYPD
25 officials and their systemic failures that led to the

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2 harm that our clients experienced.

3 THE COURT: Okay. I think I've probably
4 reached the limit of whether I can do anything more on
5 this today. So I think we're done. If I didn't say it
6 before, but you should produce the documents that were
7 ordered produced by the 21st, and I will probably issue a
8 brief written order on the first thing we did, 774 I
9 think it is, and eventually you'll hear something about
10 the after-action review documents. And I think that's
11 it for those two items, and that's all I'm prepared to
12 do today.

13 Ms. Stoughton, anything else on 680?

14 MS. STOUGHTON: No, Your Honor, thank you.

15 THE COURT: Mr. Scutero, anything?

16 MR. SCUTERO: No, Judge, thank you.

17 THE COURT: Okay, thank you, everyone, good
18 bye.

19 MR. SCUTERO: Thank you, have a good day.

20 (Whereupon the matter is adjourned.)

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C E R T I F I C A T E

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4 I, Carole Ludwig, certify that the foregoing
5 transcript of proceedings in the United States District
6 Court, Southern District of New York, In Re: New York
7 Policing During Summer 2020 Demonstrations, docket
8 #20cv8924, was prepared using PC-based transcription
9 software and is a true and accurate record of the
10 proceedings.

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Signature Carole Ludwig

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Date: February 14, 2023

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